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Republican Study Committee

July 1, 1988

Barbara Vucanovich, M.C.
Chairman

Ed Buckham
Executive Director

EXECUTIVE SUMMARY

INTELLIGENCE OVERSIGHT ACT, H.R. 3822

Status

* H.R. 3822 has been reported out of the Intelligence Committee (Report 100-705, Part 1). It passed 11-6 on May 11, 1988..

* Foreign Affairs Committee has completed hearings and is filing its report. It passed 28-17 on June 22, 1988.

* The bill is expected to come to the floor at the end of July, after the recess for the Democratic convention.

* The Senate passed a similar bill, S.1721, by 71-19 on March 19, 1988.

Proposed House Amendments

By Congressman Broomfield, that would essentially permit the President to withhold notification "if he determines that it is necessary to meet rare, extraordinary circumstances constituting a serious threat to United States national security interests."

By Congressman Solomon, who would create criminal penalties for government employees (including Members of Congress, staff, or Executive Branch employees), who, without authorization, knowingly and willfully disclose classified information.

This material was prepared at the request of a member of the Republican Study Committee. The views contained in it should not be construed as being the views of any specific officer or member of the Republican Study Committee.
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INTELLIGENCE OVERSIGHT ACT, H.R. 3822

Alias "48-Hour Bill"

INTRODUCTION

"Giddy with summit euphoria, blind to realpolitik, and emboldened by a weakened presidency, Congress is hellbent on destroying the covert-action capability of the Central Intelligence Agency." Bruce Fein's article (Washington Times, June 21, 1988) accurately describes the motivation behind the bill H.R. 3822 and the potential destruction to U.S. foreign policy the legislation could cause.

The bill's failing is its requirement that Congress be given prior notification of all covert actions. Under extreme circumstances, however, notification must occur "as soon as possible, but in no event later than 48 hours after" the covert action has been authorized. This requirement exceeds current statutes and would seriously effect end U.S. covert actions. Congress has a poor track record with its ability to plug security leaks, and so it is reasoned that the inevitable leaks from Capitol Hill resulting from prior notification would compromise sensitive covert operations. Moreover, the bill's severe restriction on presidential power raises serious constitutional concerns.

The 48-hour bill is the direct result of Congressional overreaction to the Iran-Contra affair. Hence, its purported goal is to increase Congressional oversight of covert actions. But it would curtail the country's ability to act covertly and thus undermine the the national security of the United States.

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MAIN PROVISIONS OF H.R. 3822

- It amends the framework of the Intelligence Oversight Act of 1980 regarding notification of Congress of intelligence activities. For cases of extreme time sensitivity, it replaces the requirement of reporting to congress in a "timely fashion" with a timetable of not to exceed 48 hours.

- The bill allows the President to authorize a covert action when a finding determines that the action is important to national security and is necessary to support the foreign policy objectives of the United States.

- The finding must be in writing, signed by the President, and must specify each agency, department, or entity authorized to fund or significantly participate in the covert action. It also must specify whether third parties will be involved.

- It permits an oral finding when in extraordinary cases immediate action is required. But in no circumstances shall Congress be notified later than 48 hours after a covert action is authorized. Notification can be given to the four Leaders of Congress and the chairmen and ranking minority members of the intelligence committees (the so-called Gang of Eight) when immediate action is required.

- Congress must be notified of "any significant change...or undertaking" in a covert action previously authorized.

- It clarifies the definition of covert action and attempts to draw the line between covert activities and other intelligence and intelligence-related activities, i.e. tactical military activities.

- No government funds appropriated for or available to any government agency may be expended for covert action purposes unless a finding is made and the notification requirements are fulfilled.

- All intelligence oversight provisions would be consolidated into one statute, Title V of the National Security Act of 1947, as amended, by repealing the existing section 662 of the Foreign Assistance Act of 1961 (the Hughes-Ryan Amendment) and incorporating the reworded substance of that section in a new section 504(d) of the National Security Act of 1947.

EXECUTIVE BRANCH ACTIONS

As a result of the President's National Security Decision Directive (NSDD 286), most of the provisions in H.R. 3822 are already White House policy. For example:

- The Executive Branch is already committed to notifying Congress, in virtually all cases, as soon as possible. Usually prior notice is given before an action is started;

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- 48 hours is the usual timeframe the President has established for congressional notification of extremely sensitive covert actions (now called "special activities");

- If notification is delayed because of extraordinary circumstances, then the President must certify the delay and have his National Security Planning Group (NSPG) review the situation every ten days;

- A finding must be obtained before any agency or department can conduct a covert action;

- A finding must be in writing, cannot be made retroactive, and must be consistent with existing law;

- Foreign policy justification and specifying the involvement of third parties are already in effect;

- Reporting requirements for significant changes in covert action programs are already established;

The Iran-Contra Committee concluded in its report that "the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance." (p. 423, emphasis added). It also stated that, "Experience has shown that these laws and procedures, if respected, are adequate to the task." (p. 375)

Following the Tower Commission report, a new National Security Advisor was appointed, Judge Webster was sworn in as the Director of Central Intelligence (DCI), the National Security Council (NSC) was prohibited from engaging in special activities, and the position and authority of the NSC legal advisor was upgraded. Taken together, these Presidential actions, including NSDD 286, amount to a great deal of effort by the Administration to address the concerns of Congressional oversight and covert action reform. It should be clear, therefore, that legislation codifying these reforms is unnecessary and unwise.

OPERATIONAL PERSPECTIVE

As succinctly described in the dissenting views of the Intelligence Committee's Minority Members (Report 100-705, Part 1), the bill's "stubborn insistence on ignoring the real world of intelligence operations" will have catastrophic results. In opposing H.R. 3822, former DCI William Colby said that the bill will make "the whole process rigid, rather than reflective of the real world."

Furthermore, a blue ribbon panel of intelligence and foreign policy professionals urged the Committee not to endorse the restrictive 48-hour provision in a letter signed by former Secretary of State Henry Kissinger, former National Security Advisors Zbigniew Brzezinski and Lt. General Brent Scowcroft, former Directors of Central Intelligence William Colby and Richard Helms, and former senior CIA official George Carver.

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Since the Revolutionary War covert actions have been an important part of American foreign policy. There are times when covert action is the only option the country has. The people who carry out covert operations depend on the secrecy of their mission. Both their lives and the country's reputation are at risk. Also at risk are the United States' relationships with other countries with whom it cooperates. Evidently, those covert actions are important enough for the U.S. to take those risks.

The concept of risk, therefore, should be the operative measure by which notification should be judged; not time. In rejecting the 48-hour fixed time limit, Admiral Stansfield Turner (former DCI under President Carter) said that, "...timeliness is not measured by a clock. Timeliness should be measured by the risk...When the risk to human life is diminished sufficiently is when it is timely to notify the Congress...."

According to Members of the Intelligence Committee, in only four instances has notification to Congress been delayed. Three of those occurred during the Carter Administration. All of them dealt with the release of U.S. citizens held hostage and at risk in the Middle East.

One of the best examples of delayed notification occurred in 1980 during the Iranian hostage crisis. Briefly, the Canadian Embassy in Iran assisted the U.S. in smuggling out six American Diplomats who had taken refuge there. The one request the Canadians had in exchange for their cooperation was total secrecy. Obviously, Canada feared that its Embassy might be attacked if it were leaked that it was helping the United States. A covert operation was authorized by President Carter and he told Congress about the operation after a three month delay.

Another example of delayed Congressional notification occurred during the six months of covert activity that preceded the failed Desert I mission that attempted to rescue hostages held in the American Embassy in Tehran. Admiral Turner testified that absolute secrecy was necessary, and that Congressional notification would have cancelled the mission. Congress was notified after the failure.

These stories simply illustrate that there will be occasions when, in order to receive critical cooperation from foreign countries and to conduct certain covert actions, Congressional notification must be delayed. Such delays can occur under the guidelines of NSDD 286 without fear of abuse. It is this type of extraordinary situation that requires flexibility. It has prompted Secretary of Defense Frank Carlucci to say, "Who among us can say with absolute certainty that no future President will ever be faced with circumstances requiring that notification of a covert action to the Congress be delayed beyond 48 hours?" (emphasis added)

New Definition of Covert Action

One provision actually accepted by the Administration is the revised definition of "covert action." In part, it reads:

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> ...the term 'covert action' means an activity or activities conducted by an element of the United States Government to influence political, economic, or military conditions abroad so that the role of the United States Government is not intended to be apparent or acknowledged publicly....A request by any department, agency, or entity of the United States to a foreign government or a private citizen to conduct a covert action on behalf of the United States shall not be deemed to be a covert action.

POLITICAL PERSPECTIVE

The bottom line of H.R. 3822 is partisan politics. It seems the majority of Democrats in both Houses want to cripple further the Reagan Administration, cause problems for the Bush Presidential campaign, and make a power grab for a greater policy making role.

Supporting this theory, Eugene Rostow, a former State Department official and distinguished legal scholar, has concluded that the bill is designed "to put Members of the two intelligence committees squarely into the center of the President's decision-making process as active and indeed 'equal' participants. This is surely unconstitutional."

In the Committee Report, proponents of the legislation have argued that prior notification and consultation are not designed "simply to protect prerogatives of Congress, but to give the President the benefit of independent counsel on important policy decisions...." That statement in fact substantiates the claim that Congress is seeking a larger and more intrusive role in foreign policy and intelligence policy matters - a trend that has grown over the last decade.

Constitutional Concerns

The Administration and the Minority Members of the Intelligence and Foreign Affairs Committees believe that H.R. 3822 is constitutionally invalid because it intrudes on the President's powers as head of State and Commander-in-Chief. It is once again an example of Congressional micromanagement of U.S. foreign policy.

The bill is considered to be unconstitutional for several reasons:

- Article II, section 1 of the Constitution gives all executive authority to the President. That authority includes intelligence activities and covert action which is an integral part of foreign affairs. The framers of the Constitution demonstrated that the President has nearly all the authority to conduct foreign affairs.

- Congressional demands of information on extremely sensitive intelligence operations is an infringement on the judicially recognized doctrine of executive privilege. Therefore the constitutional principle of separation of powers is violated.

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- The intrusion by the Legislative Branch into Presidential execution of his foreign affairs powers violates the spirit of Article I, section 6 of the Constitution. That section prohibits a Member of the Legislative Branch to exercise functions of a government office in the Executive Branch. Of course Presidential and Congressional consultation is necessary and good, but that is very different from Congress assuming a constitutional right to participate in consultations that comprise the decision-making process of the Executive.

- The prior notification clause as well as the 48-hour deadline for extremely time-sensitive cases is simply a veil for prior consultation. Eugene Rostow explains that the so-called reporting requirements are not that at all, but rather "confer upon two committees of Congress the right and power to advise the President in advance of his decisions about how to execute the law." This consultation/notification requirement gives the intelligence committees or Gang of Eight a quasi-legislative veto over Presidential policies, which is clearly unconstitutional.

CONCLUSION

Dr. Zbigniew Brzezinski strongly warned against passage of H.R. 3822. He said that "the 48-hour notice for covert operations...would undercut fatally the President's ability to conduct the necessary operations which occasionally require absolute secrecy." In their dissenting views, the Minority Members of the Intelligence Committee concluded that, "By trying to wrap H.R. 3822 in the flag of legislative oversight, some of the bill's proponents hope to strike at covert action by making it impossible in some cases and practically impossible in a host of others."

There is no getting around it: the real world requires a covert action capability. The bill, however, could endanger the lives of American employees simply trying to do their job. This legislation serves no purpose other than to create more roadblocks and more confrontation in an already strained relationship between the Legislative and Executive Branches. Furthermore, it is highly probable that the legislation is unconstitutional.

As an indication of support, 23 of 24 Republican Members on the Intelligence and Foreign Affairs Committees who studied this legislation closely opposed it because of the 48-hour rule. In the words of Congressmen Hyde, Livingston, Lungren, Cheney, McEwen, and Shuster, "H.R. 3822 is impractical, unworkable and dangerous."

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DeForest A. Hamilton III
National Security Policy Analyst

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